2013 IL App (4th) 120441-U

NO. 4-12-0441

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
November 25, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Macoupin County
RONALD D. ROBBINS,	)	No. 05CF205
Defendant-Appellant.	)	
	)	Honorable
	)	Kenneth R. Deihl,
	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices Appleton and Holder White concurred in the judgment.

ORDER

¶ 1 *Held*: The motion of the office of the State Appellate Defender to withdraw as appellate counsel is granted and the trial court's dismissal of defendant's petition for postconviction relief is affirmed.

¶ 2 Defendant, Ronald D. Robbins, appeals the trial court's dismissal of his *pro se* postconviction petition. On appeal, the office of the State Appellate Defender (OSAD) was appointed to represent him. OSAD has filed a motion to withdraw as appellate counsel pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987), alleging an appeal would be frivolous. We grant OSAD's motion and affirm the court's dismissal of defendant's petition.

¶ 3 I. BACKGROUND

¶ 4 On August 23, 2005, the State charged defendant, in case No. 05-CF-205, with aggravated driving under the influence of alcohol (DUI) (625 ILCS 5/11-501(d)(1)(A) (West

2004)). On September 11, 2009, defendant entered a negotiated guilty plea to the charged offense, as well as to two additional aggravated DUI charges (case Nos. 05-CF-222 and 05-CF-272). However, on November 18, 2009, the trial court granted defendant's motion to withdraw his guilty pleas and vacate judgment.

¶ 5 On May 4, 2010, the trial court conducted a bench trial in case No. 05-CF-205. The State's evidence showed Illinois State Trooper Scott Watkins executed a traffic stop on defendant's vehicle on August 12, 2005, after defendant swerved into Watkins's oncoming lane of traffic and Watkins "clocked" defendant speeding. During the traffic stop, Watkins detected a strong odor of alcohol coming from inside defendant's vehicle. When speaking with defendant, he noticed an odor of alcohol coming from defendant's mouth. Watkins also observed that defendant had slurred, thick-tongued speech, and glassy, blood-shot eyes. Watkins described defendant's performance on two field sobriety tests and testified defendant failed both tests. Through the testimony of Watkins and Todd Savage, a breath alcohol technician with the Illinois State Police, the State presented evidence that defendant submitted to a breath test, which revealed he had an alcohol concentration in his breath of 0.144. The State further presented evidence that defendant committed DUI offenses on two previous occasions.

¶ 6 Defendant testified on his own behalf, stating he was passing another vehicle when he observed a police vehicle parked on the road. He asserted the police vehicle was stationary and denied that he tried "to run [any] police officer off the road." After being pulled over, defendant recalled the police officer telling him he had been stopped for speeding. He could not recall the officer saying anything about defendant swerving into the oncoming lane of traffic. Defendant thought he "did all right" on the field sobriety tests, stating he felt rushed

during the walk-and-turn test and generally had problems walking.

¶ 7 Defendant further testified he had health conditions at the time of his arrest, including heart problems, ulcers, and breathing problems. He described medication he was taking and testified he sometimes experienced tiredness and dizziness as side effects of those medications. Defendant asserted he experienced dizziness on the night of his arrest.

¶ 8 At the conclusion of defendant's bench trial, the trial court took the matter under advisement. On July 28, 2010, it found defendant guilty of aggravated DUI. (The record reflects bench trials were conducted in case Nos. 05-CF-222 and 05-CF-272 during the same time frame and the court also found defendant guilty of aggravated DUI in connection with each of those cases; however, only case No. 05-CF-205 is at issue in this appeal.)

¶ 9 On August 25, 2010, defendant filed a motion for a new trial, which the trial court denied. On November 30, 2010, the court sentenced him to one year in prison to be served consecutively to defendant's sentences in case Nos. 05-CF-222 and 05-CF-272. Defendant did not file a direct appeal.

¶ 10 On April 2, 2012, defendant filed a *pro se* postconviction petition in case No. 05-CF-205, alleging his constitutional rights were violated because the "[o]fficer stated that [defendant] tried to run [the officer] off the road and that [the officer] was driving in the opposite direction, however [the officer] was parked on [the road]." Defendant further asserted his court-appointed attorney was ineffective for failing to raise that issue with the trial court. The same date, the trial court made a docket entry, stating it had reviewed defendant's petition and found summary dismissal was appropriate. The court dismissed the petition, finding defendant could "not possibly show entitlement to [the] relief sought."

¶ 11 This appeal followed. As stated, OSAD was appointed to represent defendant on appeal. On May 8, 2013, it filed a motion to withdraw as appellate counsel. The record shows service of the motion on defendant. This court granted defendant leave to file additional points and authorities but he has failed to respond. After examining the record and executing our duties in accordance with *Finley*, we grant OSAD's motion and affirm the trial court's judgment.

¶ 12 II. ANALYSIS

¶ 13 On appeal, OSAD argues no colorable argument can be made that the trial court erred in dismissing defendant's *pro se* postconviction petition. Specifically, it contends the court's dismissal procedure was not flawed and defendant's petition presented no meritorious issue that would entitle him to postconviction relief. We agree.

¶ 14 "Under the Post-Conviction Hearing Act [(Act)], individuals convicted of criminal offenses may challenge their convictions on grounds of constitutional violations." *People v. Domagala*, 2013 IL 113688, ¶ 32, 987 N.E.2d 767 (citing 725 ILCS 5/122-1 through 122-7 (West 2010)). At the first stage of postconviction proceedings, the trial court must independently review the petition within 90 days of filing and, taking the allegations as true, "determine whether 'the petition is frivolous or is patently without merit.' " *People v. Hodges*, 234 Ill. 2d 1, 10, 912 N.E.2d 1204, 1208-09 (2009) (citing 725 ILCS 5/122-2.1(a)(2) (West 2006)). "If the court determines that the petition is either frivolous or patently without merit, the court must dismiss the petition in a written order." *Hodges*, 234 Ill. 2d at 10, 912 N.E.2d at 1209 (citing 725 ILCS 5/122–2.1(a)(2) (West 2006)).

¶ 15 A *pro se* petition for postconviction relief is frivolous or patently without merit only when it "has no arguable basis either in law or in fact." *Hodges*, 234 Ill. 2d at 11-12, 912

N.E.2d at 1209. "A petition which lacks an arguable basis either in law or in fact is one which is based on an indisputably meritless legal theory or a fanciful factual allegation." *Hodges*, 234 Ill. 2d at 16, 912 N.E.2d at 1212. "The summary dismissal of a postconviction petition is reviewed *de novo*." *People v. Tate*, 2012 IL 112214, ¶ 10, 980 N.E.2d 1100.

¶ 16 On appeal, OSAD has identified potential issues for review. Initially, it contends no colorable argument can be made that the trial court's dismissal procedure was flawed. We agree. The record shows the court reviewed defendant's postconviction petition within the required time frame and determined dismissal was appropriate. It ordered the circuit court clerk to forward a copy of its docket entry to defendant and he filed a timely appeal. Additionally, the trial court's dismissal of defendant's postconviction petition in a docket entry rather than in a written order does not require reversal of its decision. See *People v. Porter*, 122 Ill. 2d 64, 82-83, 521 N.E.2d 1158, 1165 (1988) (holding section 122-2.1(a)(2) of the Act was "directory as to the entry of the written order and its contents rather than mandatory" and a court's "failure to specify the findings of fact and conclusions of law in the written order does not require reversal of the dismissal order.").

¶ 17 OSAD next argues no colorable argument can be made that defendant is entitled to postconviction relief based on his claim that Watkins, the arresting officer, testified untruthfully regarding the events leading up to defendant's traffic stop. It notes, in his petition, defendant failed to articulate how Watkins' testimony violated his constitutional rights. Nevertheless, OSAD states it considered, and rejected, three potential issues.

¶ 18 First, OSAD argues defendant's allegation regarding Watkins' testimony does not give rise to a reasonable doubt claim. When considering a challenge to the sufficiency of the

evidence, a reviewing court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt." *People v. Lloyd*, 2013 IL 113510, ¶ 42, 987 N.E.2d 386. Reversal should not occur " 'unless the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt.' " *Lloyd*, 2013 IL 113510, ¶ 42, 987 N.E.2d 386 (quoting *People v. Collins*, 214 Ill. 2d 206, 217, 824 N.E.2d 262, 267-68 (2005)).

¶ 19 Initially, we note "[q]uestions as to the sufficiency of the evidence have been held not to present a constitutional question and therefore are not properly considered in post-conviction proceedings." *People v. Dunn*, 52 Ill. 2d 400, 402, 288 N.E.2d 463, 464 (1972); see also *People v. Izquierdo*, 262 Ill. App. 3d 558, 560, 634 N.E.2d 1266, 1268 (1994) ("Reasonable doubt of a defendant's guilt is not a proper issue for a post-conviction proceeding."). Thus, postconviction relief could not be granted to defendant based upon a challenge to the sufficiency of the evidence.

¶ 20 However, the record also establishes that, even absent the challenged statements from Watkins, the evidence presented was more than sufficient to establish defendant's guilt beyond a reasonable doubt. To prove defendant guilty of aggravated DUI, the State had to show defendant drove a vehicle while under the influence of alcohol or with an alcohol concentration in his breath of 0.08 or more, and that he committed a DUI offense "for the third or subsequent time." 625 ILCS 5/11-501(d)(1)(A) (West 2004)). Here, the State's evidence showed Watkins executed a traffic stop on a vehicle being driven by defendant. He noted a strong odor of alcohol coming from inside the vehicle and from defendant's mouth. Watkins observed that defendant

had slurred, thick-tongued speech and glassy, blood-shot eyes. Evidence showed defendant failed two field sobriety tests and submitted to a breath test, showing the alcohol concentration in his breath was 0.144. The State's evidence further showed defendant committed DUI offenses on two previous occasions. We agree with OSAD that defendant can make no colorable argument regarding the sufficiency of the evidence against him.

¶ 21 Second, OSAD contends defendant's allegations do not give rise to a perjury claim. "[T]he State's knowing use of perjured testimony to obtain a criminal conviction constitutes a violation of due process of law." *People v. Olinger*, 176 Ill. 2d 326, 345, 680 N.E.2d 321, 331 (1997). "A conviction obtained by the knowing use of perjured testimony must be set aside if there is any reasonable likelihood that the false testimony could have affected the jury's verdict." *Olinger*, 176 Ill. 2d at 345, 680 N.E.2d at 331. " 'Where a criminal defendant seeks to overturn his conviction on the basis of perjured testimony, the defendant must not merely allege perjury by State's witnesses, but must present clear, factual allegations of perjury and not mere conclusions or opinions.' " *People v. Moore*, 2012 IL App (4th) 100939, ¶ 28, 975 N.E.2d 1083 (quoting *People v. Thomas*, 364 Ill. App. 3d 91, 104, 845 N.E.2d 842, 855 (2006)).

¶ 22 In his postconviction petition, defendant alleged his constitutional rights were violated by Watkins stating defendant "tried to run [Watkins] off the road and that [Watkins] was driving in the opposite direction" when Watkins was, instead, parked on the roadway. At defendant's bench trial, Watkins and defendant presented conflicting accounts of the events which led to defendant's traffic stop. Specifically, Watkins testified he executed a traffic stop on defendant's vehicle after defendant swerved into Watkins' lane of traffic and Watkins "clocked" defendant speeding. However, defendant asserted a police vehicle had been stationary and

parked on the road as he passed. He also denied that he tried to "run [any] police officer off the road."

¶ 23 Defendant's contradiction of Watkins' testimony does not amount to "clear, factual allegations of perjury" and nothing in the record aside from defendant's own testimony would support a perjury claim. Rather than establishing that Watkins testified falsely, the inconsistency between Watkins' and defendants' testimony concerned matters of witness credibility and constituted a conflict in the evidence that was for the trial court to resolve. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228, 920 N.E.2d 233, 243 (2009) ("[I]n a bench trial, it is for the trial judge, sitting as the trier of fact, to determine the credibility of witnesses, to weigh evidence and draw reasonable inferences therefrom, and to resolve any conflicts in the evidence."). Moreover, we find no reasonable likelihood that the alleged false statements would have affected the outcome of defendant's trial. As stated, the evidence at defendant's trial was more than sufficient to establish the necessary elements of aggravated DUI as charged by the State. Watkins' testimony about the events leading up to defendant's traffic stop was not essential to the State's case.

¶ 24 Third, OSAD argues defendant's postconviction allegations do not give rise to a claim of unfair prejudice. "[A] trial court may exercise its discretion to exclude evidence, even when it is relevant, if its prejudicial effect substantially outweighs its probative value." *People v. Walker*, 211 Ill. 2d 317, 337, 812 N.E.2d 339, 350 (2004). " 'Prejudicial effect' *** means that the evidence in question will somehow cast a negative light upon a defendant for reasons that have nothing to do with the case on trial." *People v. Pelo*, 404 Ill. App. 3d 839, 867, 942 N.E.2d 463, 487 (2010).

¶ 25 Here, Watkins' testimony that he was driving rather than parked when he was passed by defendant's vehicle did nothing to cast a negative light on defendant. Although Watkins additionally testified defendant swerved into Watkins' lane of travel, such testimony was evidence from which the trier of fact could have inferred defendant's driving was impaired and, thus, directly relevant to the aggravated DUI charge against him. OSAD correctly states no colorable argument can be made that Watkins' testimony was unduly prejudicial to defendant.

¶ 26 Finally, OSAD argues no colorable argument can be made that defendant's trial counsel was ineffective for failing to raise the forgoing potential issues with the trial court. An ineffective-assistance-of-counsel claim is evaluated under the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and requires that a defendant demonstrate (1) "that counsel's performance fell below an objective standard of reasonableness" and (2) "a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *People v. Henderson*, 2013 IL 114040, ¶ 11, 989 N.E.2d 192. A defendant's failure to establish either *Strickland* prong precludes a finding of ineffective assistance of counsel. *Henderson*, 2013 IL 114040, ¶ 11, 989 N.E.2d 192.

¶ 27 We agree with OSAD. As discussed, the record fails to reflects any merit to defendant's challenge to Watkins' testimony regarding the events leading up to defendant's traffic stop. Defendant is unable to establish either that his counsel's performance was deficient or that he suffered prejudice. Moreover, we note defense counsel did elicit testimony from defendant at the bench trial that contradicted Watkins' version of events and brought defendant's position to the trial court's attention. As a result, defendant's ineffective-assistance-of-counsel claim is also without merit.

III. CONCLUSION

¶ 28 For the reasons stated, we grant OSAD's motion to withdraw as appellate counsel and affirm the trial court's judgment.

¶ 29 Affirmed.